IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4069

FELIX A OLIVIERI,

Plaintiff-Appellant,

v.

MATT L. RODRIGUEZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 7313 **James H. Alesia,** *Judge.*

Argued July 8, 1997--Decided August 15, 1997

Before Posner, Chief Judge, and Cudahy and Ripple, Circuit Judges,

Posner, Chief Judge.

A probationary Chicago police officer fired on grounds of having sexually harassed female probationers at the police training academy sued the police superintendent under 42 U.S.C. sec. 1983. The basis of the suit was the ex-officer's claim that firing him on such a ground has prevented him from obtaining other employment as a police officer and by doing this has curtailed his liberty of employment without due process because, being merely a probationer, he was not granted a hearing before (or for that matter after) he was fired. The district court granted summary judgment for the superintendent.

A line of cases that reaches back to *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), establishes that although defamation by a public officer is not a

constitutional tort, because the interest that it invades, the interest in reputation, is not deemed liberty or property within the meaning of the due process clauses of the Constitution, *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Dishnow v. School District*, 77 F.3d 194, 199 (7th Cir. 1996), when the character and circumstances of the defamation are such as to have "foreclose[d] his freedom to take advantage of other employment opportunities" he can bring a suit based on the deprivation of his liberty of employment or occupation. *Paul v. Davis, supra*, 424 U.S. at 710, quoting *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *see also, e.g., Bigby v. City of Chicago*, 766 F.2d 1053, 1057 (7th Cir. 1985); *Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987); *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991). The classic case of this type, illustrated by *McGrath* itself, is a government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure. *See Board of Regents v. Roth, supra*, 408 U.S. at 573-74; *Colaizzi v. Walker, supra*, 812 F.2d at 307. The distinction between mere defamation and an infringement of liberty of occupation is merely one of degree, especially when the defamation relates to a person's fitness for a particular type of employment, but it is a distinction to which the courts are committed.

This case is unusual because there is no evidence that the defendant disclosed to anyone the grounds of the plaintiff's discharge. The plaintiff argues that this makes no difference to his employability because no police department will hire him without asking him why he was fired by the Chicago Police Department. If he answers truthfully, he will reveal the ground of the termination as effectively as (actually more effectively than) if the Department had taken out a full-page ad in every newspaper in the nation announcing the termination of Felix A. Olivieri for sexually harassing female

probationary officers at the Chicago police training academy. This type of argument has persuaded three circuits that dissemination by the defendant in a case such as this is not required after all. *Donato v. Plainview-Old Bethpage Central School District*, 96 F.3d 623, 631-32 (2d Cir. 1996); *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 45 (2d Cir. 1987); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989). Our court, however, insists on dissemination, *e.g.*, *Johnson v. Martin, supra*, 943 F.2d at 16-17 (explicitly rejecting *Brandt*); *Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986), as do the First and Third Circuits. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74-75 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988). The Fifth and Eighth have hedged, *Hogue v. Clinton*, 791 F.2d 1318, 1322-23 n. 7 (8th Cir. 1986); *Burris v. Willis Independent School District, Inc.*, 713 F.2d 1087, 1092 (5th Cir. 1983), and the others haven't addressed the issue.

We are not disposed to depart from our position in this intercircuit conflict, and not only because stare decisis has its claims. The contrary position resembles the largely discredited doctrine of "compelled republication" or (more vividly) "self-defamation," which allows the victim of a defamation to satisfy the requirement of publication by publishing it himself, for example to prospective employers as in the present case. *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 911-12 (7th Cir. 1994); *Dishnow v. School District, supra*, 77 F.3d at 199; *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1553-54 (10th Cir. 1995). The doctrine is inconsistent with the fundamental principle of mitigation of damages. It is no doubt highly likely that the ground of Olivieri's discharge would become known to prospective employers, but it is not certain. A prospective employer might not ask him—might ask only the Chicago Police Department, which for all we know might refuse to disclose the grounds of Olivieri's

discharge; many former employers refuse to answer such inquiries, because of fear of being sued for defamation. The principle of self-defamation, applied in a case such as this, would encourage Olivieri to apply for a job to every police force in the nation, in order to magnify his damages; and to blurt out to each of them the ground of his discharge in the most lurid terms, to the same end. Most states, as noted in the decisions cited above, reject self-defamation as a basis for a tort claim, and it would be odd for federal constitutional law to embrace this questionable doctrine.

A further consideration in favor of the majority position is brought to light by asking what the Chicago Police Department should have done when it decided to discharge Olivieri. His answer is that it should have granted him a hearing. This comes close to arguing that there is no such thing as probationary public employment--that no public employee can be fired without a hearing because if he is, and the ground of the discharge impugns his fitness for employment in a similar job, as it very often will, his employer will have violated his constitutional rights, no matter how secretive the employer is about the ground.

Finally, there is a qualitative difference, bearing on culpability, between publicizing a stigmatizing ground of dismissal and refusing to do so, that the plaintiff's position would erase. The public employer who goes out of his way to publicize the ground of the dismissal is deliberately taking measures to make it difficult or impossible for the employee to obtain comparable employment, and is thus acting with intent to infringe a constitutionally protected liberty. There is no similar intent in the case in which the employer does not disclose, let alone publicize, the ground of its action. The effect on the employee's future employability is in that case the unavoidable by-product of action taken for a wholly different purpose, that of improving the employer's own work force. The employer in such a case would be unconcerned if the employee found comparable employment elsewhere. The

case is thus at the farthest extreme from the blacklist cases out of which the constitutional doctrine arises.

The appeal presents another issue. The judge refused to permit the plaintiff to depose the defendant until the plaintiff submitted written interrogatories the answers to which would indicate whether deposing the defendant would serve a useful purpose. The judge was influenced in following this course of action by the fact that the superintendent of the Chicago police is a busy official who should not be taken away from his work to spend hours or days answering lawyers' questions unless there is a real need. *Van Arsdale v. Clemo*, 825 F.2d 794, 798 (4th Cir. 1987); *cf. Clinton v. Jones*, 117 S. Ct. 1636, 1650-52 (1997); *Powers v. Chicago Transit Authority*, 846 F.2d 1139, 1143 (7th Cir. 1988).

A district judge's discretion in supervising pretrial discovery is broad, *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994); *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985), and it was not abused here. Quite the contrary; the course the judge followed could well be thought commanded, in the circumstances of this case, by Fed. R. Civ. P. 26(c)(3), which expressly authorizes the district court, in order to protect a person from "annoyance, embarrassment, oppression, or undue burden or expense," to direct "that discovery may be had only by a method of discovery other than that selected by the party seeking discovery." Pretrial discovery is time-consuming and expensive; it protracts and complicates litigation; and judges are to be commended rather than criticized for keeping tight reins on it. *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *cf. Clinton v. Jones, supra*, 117 S. Ct. at 1658 (concurring opinion). The right to take an immediate appeal from the denial of a motion to dismiss a suit on the basis of official immunity is expressly based, in part, on the burden of discovery to public officials. *Behrens v. Pelletier*, 116 S. Ct. 834, 838-39 (1996); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 496 (7th Cir. 1993); *Clinton v. Jones, supra*, 117

S. Ct. at 1657 (concurring opinion). They should not have to spend their time giving depositions in cases arising out of the performance of their official duties unless there is some reason to believe that the deposition will produce or lead to admissible evidence. Under the law of this circuit Olivieri had no case unless the defendant had publicized the ground of Olivieri's discharge. (Even then he had no case against the only defendant whom he has named, the superintendent of the police department, unless the superintendent himself participated in publicizing the grounds of the discharge. *E.g.*, *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978); *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993).) Deposing the superintendent was not necessary in order to get an answer under oath to this simple question; a written interrogatory would do just as well. Perhaps anticipating a negative answer, Olivieri's lawyer did not propound such an interrogatory and the judge therefore quite rightly refused to let him depose the superintendent.

Affirmed.

IN THE
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No. 96-4069

FELIX A OLIVIERI,

Plaintiff-Appellant,

v.

MATT L. RODRIGUEZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 7313 **James H. Alesia,** *Judge.*

[August 15, 1997]

JUDGMENT — ORAL ARGUMENT

Honorable Richard A. Posner, Chief Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FELIX A OLIVIERI,

Plaintiff,

No. 95 C 7313 *v.*

MATT L. RODRIGUEZ,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Matt L. Rodriguez's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons discussed hereafter, Defendant's motion is granted.

I. BACKGROUND

In August of 1994, Plaintiff Felix A. Olivieri was employed by the City of Chicago as a probationary police officer and assigned for training at the police training academy. While at the police training academy, administrative charges were filed against Olivieri by the Chicago Police Department for making statements of a sexual nature to fellow probationary police officers and for making unwelcomed physical advances of a sexual nature toward the same officers. The allegations were investigated. Following the investigation, Defendant Matt L. Rodriguez — the Superintendent of the Chicago Police Department — discharged Olivieri.

Following his discharge, Olivieri applied for employment as a police or security officer with the Northwestern University Police Department, the University of Chicago Police Department, the DePaul University Security Police, and the

University of Illinois at Chicago Police Department. Olivieri informed each of the prospective employers that he had been discharged by the Chicago Police Department because of an allegation of sexual harassment.

Olivieri's step-mother, Rose Olivieri — a police officer — inquired into the possibility of her step-son's employment with the Federal Reserve Police Department, the Evanston Police Department, and the U.S. Marshal's Service. Rose informed each of the potential employers that Olivieri had been terminated due to allegations of sexual harassment.

To date, Olivieri has not been hired by any of the prospective employers.

Olivieri does not know whether Superintendent Rodriguez or any other employee of the Chicago Police Department discussed the sexual harassment allegations with the potential employers.

Olivieri brought a complaint against Superintendent Rodriguez under 42 U.S.C. §1983 premised on deprivations of his constitutionally protected Fourteenth Amendment liberty interest.

This matter is now before the Court on Superintendent Rodriguez's motion for summary judgment.

II. SUMMARY JUDGMENT – STANDARD OF REVIEW

Under FED. R. CIV. P.56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987).

III. DISCUSSION[1]

Olivieri brings two "independent" §1983 claims premised on the deprivation of a liberty interest: (1) deprivation of an occupational liberty interest in one's post-employment reputation and (2) deprivation of a hearing prior to one's termination to refute the charges and clear one's name.

To establish a successful §1983 claim, Olivieri must show that the conduct complained of was committed by a person acting under color of state law and that the conduct deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990). Superintendent Rodriguez does not dispute that, if actionable, the conduct complained of occurred while he acted under the color of state law; thus, the issue is whether Olivieri was deprived of rights secured by the Constitution.

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1. Superintendent Rodriguez filed a motion to strike Olivieri's affidavit and certain paragraphs of his Local Rule 12(N) response. Since the court does not find the issues discussed in the motions relevant to the analysis, the motions are denied as moot.

A. Occupational Liberty: Post-Employment Reputation

To establish a claim for "deprivation of a liberty interest in one's post-employment reputation, a plaintiff is required to show that (1) he was stigmatized by the defendant's conduct, (2) the stigmatizing information was publicly disclosed, and (3) he suffered a tangible loss of other employment opportunities as a result of public disclosure." *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991).

The Court need focus only on the second requirement — public disclosure — to resolve this claim. Olivieri has not come forward with any evidence that Superintendent Rodriguez (or anyone else within the Chicago Police Department) disclosed the stigmatizing information to any of the prospective employers.[2] *See Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986) ("Absent proof that the Police Department or any of the defendants disseminated the stigmatizing information in a manner which would reach future potential employers of the plaintiff or the community at large, she cannot show that the defendants' actions impinged on her liberty interest in pursuing her occupation.") Indeed, Olivieri and his step-mother, not Superintendent Rodriguez or the Chicago Police Department, voluntarily disclosed the damaging information to the prospective employers.

Accordingly, Superintendent Rodriguez is entitled to summary judgment.

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2. It appears that Olivieri believes that Superintendent Rodriguez was burdened with the task of coming forward with evidence that showed affirmatively that he did not disclose the information to the prospective employers. He cites no authority in support. That is, of course, wrong. As an element of his *prima facie* case, Olivieri must come forward with the evidence.

B. Due Process: Lack of a Hearing

Next, Olivieri contends that the failure to grant a hearing prior to his termination deprived him of a liberty interest without due process. As discussed above, however, since there was no public disclosure by Superintendent Rodriguez or the Chicago Police Department, there was no deprivation of a liberty interest.[3] *See Finshur v. Village of Menomonee Falls,* 31 F.3d 1401, 1409 (7th Cir. 1994); *Yatvin v. Madison Metro. Sch. Dist.,* 840 F.2d 412, 417 (7th Cir. 1988); *Ratliff,* 795 F.2d at 625-27 ("[I]f such charges were published, Ratliff had a due process right to a hearing at which she could attempt to refute the charges and and publicly clear her name.") And, since there has been no deprivation of a liberty interest, there is no entitlement to a hearing.[4]

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3. The fact that the stigmatizing information remains in Olivieri's personnel file and will likely be sent to a prospective employer, i.e., a time bomb waiting to explode, is of no consequence. As noted on more than one occasion by the Seventh Circuit, "until the time bomb goes off, the plaintiffs will sustain no injury to their reputations." *Clark v. Maurer,* 824 F.2d 565, 566 (7th Cir. 1987); *see Johnson v. Martin,* 943 F.2d 15, 17 (7th Cir. 1991) ("Likewise, Johnson's 'time bomb' claim — that 'as a matter of logic and common sense' the information in his personnel file will likely reach the public — has yet to detonate.") Similarly, since Olivieri has no evidence that the stigmatizing information was released by Superintendent Rodriguez or the Chicago Police Department to any of the prospective employers (or, for that matter, anyone else), the time bomb is still ticking.

4. Keep in mind, generally speaking, as long as the employer does not publicize the information, it may terminate the employee for no reason at all or for stigmatizing and false reasons. *See Ratliff,* 795 F.2d at 627 n.4.

Accordingly, Superintendent Rodriguez is entitled to summary judgment.

IV. CONCLUSION

For the reasons discussed above, judgment is entered in favor of defendant Superintendent Matt L. Rodriguez and against plaintiff Felix A. Olivieri.

Date: November 13, 1996.

James H. Alesia
United States District Judge